In The

Supreme Court of the United States

October Term, 1976

No. 76-305

PROGRESSIVE ENTERPRISES, INC.,
Petitioner,

v.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Progressive Enterprises, Inc., prays that a writ of certiorari issue to review the opinion and judgment of the Fourth Circuit Court of Appeals of the United States rendered in these proceedings on May 12, 1976, rehearing denied on June 7, 1976.

OPINIONS BELOW

Fourth Circuit. The opinion of the Court of Appeals for the Fourth Circuit (App. A, *infra,* pp. 1-12) is not yet reported.

District Court. The opinion of the United States District Court for the Eastern District of Virginia is not yet reported.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) to review the opinion and order of the Fourth Circuit Court of Appeals entered on May 12, 1976, rehearing denied June 7, 1976.

QUESTIONS PRESENTED

Whether the Fourth Circuit has decided an important state question in a way which is in conflict with applicable state law by holding that the effective date of a life insurance policy runs from the date of issue rather than the date of "conditional receipt" even though the life insurance company has deliberately misled the insured as to the policy's effectiveness and never returned the premium paid.

PROVISIONS INVOLVED

Va. Code Ann. 38.1-394.

> Incontestability.—In each such policy there shall be a provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date, except for non-payment of premiums; and, at the option of the insurer, provisions relating to benefits in event of disability, and provisions which grant additional insurance specifically against death by accident or accidental means may also be excepted.

Hayes v. *Durham Life Ins. Co.*, 198 Va. 670, 96 S.E. 2d 109 (1957)—Reproduced in Appendix C, pp. 35-41.

CONCISE STATEMENT OF THE CASE

On or about April 9, 1971, the respondent solicited from the petitioner an application for a $100,000 insurance policy on the life of its shareholder, Ralph N. Wood, No. 3,465,445. One week later on April 16, 1971, one month's premium was paid and a policy was issued, No. 3,465,445, pursuant to a conditional receipt. There being no evidence that Progressive Enterprises, Inc. received the conditional receipt, the only notice that Progressive Enterprises, Inc. had that there was a binder of insurance was oral notice from the agent to Progressive Enterprises, Inc., that the policy of insurance was bound. Progressive Enterprises, Inc., was not apprised that the binder expired by the terms of the conditional receipt at the expiration of sixty days from 16 April.

That conditional receipt, which was never delivered to the petitioner or to the insured stated, in brief, that the policy was in effect subject to a determination that Wood was insurable. If it was determined that Wood was insurable, a final policy would be issued. If it was determined that Wood was rated, that is a policy could be issued but at a higher rate, then the petitioner would be insured so long as the petitioner accepted the higher rate and paid the additional premium *within 60 days.*

During the following days, while medical examinations were being conducted, the conditional receipt by its terms expired, though this fact was unknown to the petitioner. After the binder expired, the respondent so notified its agent and further instructed him "not . . . to make any refund at this time, unless the applicant requests it. We will continue underwriting, although on a non-prepaid basis." No notice was given to the petitioner or the insured that the policy had expired.

Subsequently, the medical examination on Wood dis-

closed that the policy could not be written at standard rates. On July 23, 1971, the petitioner was informed of the fact that Wood was rated and agreed to and did pay on July 23, 1971, the additional premium. In the normal course of business, the parties agreed to back date to May 28, 1971, Policy No. 3,465,445, which was subsequently issued.

On May 5, 1973, the insured, Ralph N. Wood, committed suicide. The respondent refused to pay under the policy taking the position that the suicide had occurred within two years from the date of the policy, May 28, 1971. The respondent, in essence, argued that in reality there were two policies on the life of Wood. The first policy evidenced by the conditional receipt expired by its terms sixty days after receipt, i.e., on June 15, 1971. That a hiatus of coverage existed until July 23, 1971, when the final policy was issued and back-dated to May 28, 1971. Since the suicide had occurred within two years of May 28, 1971, the respondent concluded it was not obligated to honor the contract.

The petitioner, viewing the events leading up to the insurance on Wood's life as one continuous event, argued that June 16, 1971, (the day the conditional policy was written) was the operative date under the law of Virginia, and hence the policy was out of the contestability period. Buttressed by the original application dated June 9, 1971, attached to the admitted final policy, the petitioner instituted suit in Prince Edward County. The petitioner contended that in view of the fact it had no knowledge by reason of the actions of the respondent of the conditional nature of the insurance and the premium was never returned, that in reality there was only one contract of insurance, which dated from April 16, 1971. The respondent removed the suit to the United States District Court for the Eastern District of Virginia, which court decided the cause against the petitioner (App. B, *infra*,

pp. 13-34). The Fourth Circuit affirmed on May 12, 1976, and denied a rehearing on June 7, 1976. Notice of appeal was filed August 11, 1976.

REASONS FOR GRANTING THE WRIT

Virginia, like most states, has a statute which makes the issuance of a policy incontestable after it has been in force "for a period of two years from its date, except for non-payment of premiums . . . ." The purpose of such a statute is "to forbid the extension of a contestable clause for a period greater than two years from the date of the attachment of the risk of loss." *American National Ins. Co.* v. *Motta,* 404 F.2d 167, 169 (5th Cir., 1968). The Fourth Circuit's opinion in the instant case has undermined this fundamental state policy.

It would appear obvious that there was in existence, continuously and without interruption, a policy of insurance on the life of the shareholder of the petitioner for a period in excess of two years. This is true in that the conditional receipt specified the binder was good for sixty days. Thereafter, by memorandum from the respondent notifying its agent that the binder had expired, but the premium need not be returned since it was continuing to underwrite on a non-prepaid basis, the same insurance was continued until a final policy was issued on July 23, 1971, but dated May 28, 1971. The conditional binder and the final policy carry the same insurance number. The conditional binder and the final policy carry the same application for insurance and medical report. By reason of the fact that the conditional receipt was never given the petitioner or the insured, and since the respondent instructed its agent it was continuing to cover and therefore not to return the premium, there was no way the petitioner could have known it was

not continuously insured. And finally, the agent actively misled the petitioner as demonstrated from the following excerpt from the trial:

> Q. All right. And would you have brought that to to their attention?
>
> A. I don't know, sir.
>
> In a case like this—maybe I'll reveal more here about myself than I care to, in a way—in a case like this it is a rather delicate thing, you have a lot of premium dollars you're talking about.
>
> It is difficult for a lot of people to understand the rating. There are a lot of variables here.
>
> If the time is expired, and if you know the applicant —I have already said that Mr. Wood was doing as much as he could to get his requirements fulfilled—I don't see that there is much point served by telling the individual that he no longer has insurance under the conditional receipt.

How, in the face of this active conduct on the part of the respondent, could the Fourth Circuit allow the subversion of Virginia's policy of the incontestability of an insurance policy? Apparently, the answer lies in that court's clear misapplication and reliance on *Hayes* v. *Durham Life Ins. Co.*, 198 Va. 670, 96 S.E. 2d 109 (1957).[1] The *Hayes* case concerned the issue of whether any policy was in force. The issue in the instant case is when the policy came into force. The Supreme Court of Appeals specifically noted in *Hayes* that it reached its decision since "there was no acceptance of the application upon any basis; that there was no fraud alleged or proven; and that Hays was charged with knowledge that no contract of insurance would arise until after

[1] It is interesting to note that this decision was never cited by the respondent's counsel for the proposition for which the Fourth Circuit thought was dispositive.

approval of his application." *Id.* at 674. Yet, even though in the instant case there was acceptance, fraud and lack of knowledge, the Fourth Circuit held *Hayes* was controlling.

If the Fourth Circuit's clearly erroneous interpretation of Virginia law is allowed to stand, there will be, in the words of this court's Rule 19, a decision of a court of appeal on "an important state . . . question in a way in conflict with applicable state . . . law." Virginia's strong state policy making its life insurance contracts incontestable after two years will have been seriously eroded.

Petitioner recognizes that ordinarily a case raising the issues of this one is not given a writ. However, this type of gross misapplication of state law is not ordinary either. The Supreme Court must intercede to protect the integrity of state law. This court cannot allow proper state law to be perverted, as it cannot allow civil rights to be perverted by state law. Petitioner prays that the court recognize in this case the two-way nature of this court's role by granting a writ and protecting the rights of the petitioner.

CONCLUSION

The present case presents a serious misapplication of state law. Unless this court speaks, this error will likely persist. This petition, therefore, should be granted.

Respectfully submitted,

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August 9, 1976

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1289

Progressive Enterprises, Inc.,
Appellant,

-versus-

New England Mutual Life Insurance Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued: October 10, 1975. Decided: May 12, 1976.

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

Alvin B. Fox (Ellenson, Fox and Wittan on brief) for Appellant; A. C. Epps (James W. Tredway, III, Christian, Barton, Epps, Brent and Chappell on brief) for Appellee.

RUSSELL, CIRCUIT JUDGE:

This is a suit on a life insurance policy. The policy contained a provision barring recovery, except for return of premiums paid, if the insured committed suicide "within

two years from the date of issue of this Policy." The insured admittedly committed suicide. The District Court held that such suicide occurred within the two-year period "from date of issue" and granted judgment for the insurance company. The plaintiff has appealed. We affirm.

The pertinent facts are not in any substantial dispute. The insured Ralph N. Wood, Sr. applied for a policy of ordinary life insurance on April 9, 1971. The application provided that "[I]f a conditional receipt amount is paid with this Application, in accordance with Item 28 above, the insurance policy shall take effect as stipulated in the Conditional Receipt." Item 28 of the Application required the payment of "$15.00 or one month's premium whichever is larger." The agent of the insurance company issued a Conditional Receipt in the amount of $362.77 on April 16, 1971. The Conditional Receipt contained these provisions:

> A. *Underwriting Date.* The "Underwriting Date" shall be the latest of the dates of Parts I and II of the Application and the Report of the Medical Examiner.
>
> * * *
>
> C. *If Policy Can Be Issued as Applied For.* If the underwriting rules of the Company permit a policy to be issued for the plan of insurance, amount, additional benefits and rate classification applied for, it shall become effective as of the Underwriting Date.
>
> D. *If Policy Can Be Issued, But Not as Applied For.* If the underwriting rules of the Company prevent issuance of a policy exactly as applied for, but permit issuance on some basis, then the policy with the necessary changes (called the issuable policy) shall become effective as of the Underwriting date, but only if (1) *within 60 days after the Underwriting Date the applicant accepts any necessary amendment to the Application and pays an amount necessary to complete payment of at least one month's premium for the issuable policy* and (2) at the time of such acceptance and payment the proposed insured is living and there has been no change in his insurability since the Underwriting Date. * * * (Emphasis added in body.)
>
> * * *
>
> H. *General.* No insurance shall become effective except as provided in this Receipt. * * *

The health of Wood did not warrant the issuance of a policy, with rate classification, as applied for. The insurance company did, however, conduct a number of additional medical examinations in order to determine whether it could issue him a different policy. It was not until about the middle of July, 1971 that the company offered the assured a special class, Table H, rated policy.[1] The policy, as offered, was accepted and the plaintiff on July 15, 1971 paid the first annual premium, less a credit for the amount paid at the time of the issuance of the conditional receipt. The parties agree, however, that the date of the policy, for premium purposes, should be May 28, 1971, and this is the date shown on the policy as issued. The assured committed suicide on May 5, 1973. The beneficiary filed proof of loss under the policy and demanded payment. The insurance company denied liability and this suit followed.

The critical issue, on which the rights of the parties turn, is the time when the period fixed in the suicide clause com-

[1] The difference in the policy applied for and the one finally offered to and accepted by the assured is strikingly illustrated by the monthly premiums payable under the two policies. The monthly premium under the policy applied for was $362.77, under the policy issued the monthly premium was $510.35.

menced.[2] There are three possible dates for the commencement of the period provided in the suicide clause: 1. The date of the policy itself, *i.e.*, May 28, 1971; 2. The date of the Conditional Receipt, *i.e.*, April 16, 1971; and 3. The date when the policy was actually issued, *i.e.*, July 23, 1971. There are authorities which, based on the facts of the individual case, support each of these possibilities.[3] The plaintiff at the outset, adopted as "date of issue" under the suicide clause here the formal date in the policy itself. It was readily obvious, however, that the only date that would take the case out of the bar of the suicide clause was that of the Conditional Receipt; either of the other possibilities would bring the suicide within two years from "date of issue" as fixed in the suicide clause and would bar recovery under the policy's suicide clause.

Under these circumstances, the plaintiff has accordingly argued for the date of the Conditional Receipt for the commencement of the time period fixed by the suicide exclusion.

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[2] The suicide exclusion provision is as follows:

> If the Insured, whether sane or insane, shall commit suicide within two years from the date of issue of this Policy, the liability of the Company under this Policy shall be limited to the payment in one sum of the amount of premiums paid, less any indebtedness to the Company.

[3] As stated, the authorities are not uniform. Some cases construe the date of the policy itself (*Lloyd* v. *Franklin Life Insurance Company* (9th Cir. 1957) 245 F.2d 896, 899; *State Mut. Life Assur. Co.* v. *Stapp* (7th Cir. 1934) 72 F. 2d 142, 145-6; *Harrington* v. *Mutual Life Ins. Co.* (1911) 21 N. D. 447, 131 N. W. 246, 249); others the actual date of issuance irrespective of the date set forth in the policy itself (*Davis* v. *Fidelity Mut. Life Ins. Co.* (4th Cir. 1939) 107 F. 2d 150, 151; *New York Life Insurance Company* v. *Noonan* 9th Cir 1954) 215 F. 2d 905, 906, *cert. denied* 348 U. S. 928; *Crowley* v. *Travelers Ins. Co.* (5th Cir. 1952) 196 F. 2d 315, 316); and finally a number look to the date of the application or conditional receipt, (*American National Insurance Co.* v. *Motta* (5th Cir. 1968) 407 F. 2d 167). It is fair to say, however, that the difference in result among the cases arises largely out of a difference in the facts of the respective cases.

The basis for this contention may be quickly stated. The application for insurance, as executed on April 9, 1971, contained the statement that upon payment of the sum specified in Item 28 thereof, the insurance applied for "shall take effect as stipulated in the Conditional Receipt." While the assured himself did not make the payment as provided in Item 28, the soliciting agent of the Company, without the knowledge of the assured did and the plaintiff contends that this was sufficient under the terms of the application to make the policy "take effect as stipulated in the Conditional Receipt." And the plaintiff asserts that "date of issue" in the suicide clause should be construed as meaning the effective date of the policy as fixed in the Conditional Receipt. Under the reasoning, the commencement date for the suicide provision would be April 16, 1971, and suicide of the assured would have occurred beyond the two-year period as fixed therein. Whether this argument is tenable depends on a fair construction of the Conditional Receipt itself, since the application provides that the effective date referred to therein shall be "as stipulated in the Conditional Receipt."

The Conditional Receipt states that if the policy "as applied for" is issued it shall "become effective as of the Underwriting Date,"[4] or if the policy as applied for may not be issued, but one may be issued "on some basis," then the issuable policy "shall become effective as of the Underwriting Date" if "within 60 days after the Underwriting Date the applicant accepts any necessary amendment to the Application and pays any amount necessary to complete payment of at least one month's premium for the issuable pol-

---

[4] The Underwriting Date is defined in the Conditional Receipt to be "the latest of the dates of Parts I and II of the Application and the Report of the Medical Examiner," which in this case would have been April 16, 1971.

icy * * * ." Concededly, the Company did not issue a policy "as applied for." The policy it issued was on a different "basis," with different "benefits and rate classification." And the policy as issued by the Company was not accepted by the assured nor was the first month's premium on the issued policy paid "within 60 days after the Underwriting Date." It is plain, then, that the policy as issued on July 23, 1971 did not "become effective" under the Conditional Receipt on "the latest of the dates of Parts I and II of the Application and the Report of the Medical Examiner," and the "date of issuance," as used in the suicide exclusion provision, must be assumed to be either the actual date of issue of the policy or its formal date. In either event, the plaintiff would be barred from recovery by the suicide exclusion provision.

This case is easily distinguishable from *Motta,* the authority on which plaintiff primarily relies. In that case, the policy "as applied for" was issued "within 60 days" from the date of the Conditional Receipt. By the express language, this made "the effective date" of the policy that of the "Underwriting Date." But that is not this case. The policy issued here was, to repeat, not the policy "as applied for." It was an entirely different policy—and it was not offered to the applicant or issued by the Company within 60 days after the application. It is easy enough to identify a policy with an application where the policy issued is precisely the policy "applied for;" the application and the policy do not so easily merge into a single contract when the policy issued is completely different from that "applied for."

The plaintiff seeks to overcome the consequences of Section D of the Conditional Receipt with the claim that the Insurance Company, by failing to return the premium paid at the time of the issuance of the Conditional Receipt, is foreclosed from asserting ineffectiveness of the policy as of the "Underwriting Date" as defined in the Conditional Re-

ceipt. It cites as authority for this position *Smith* v. *Westland Life Ins. Co.* (1974) 115 Cal. Rptr. 750. The reasoning of that case has much to recommend it. But this is a diversity case, controlled by Virginia law; and the law of Virginia is contrarywise to the position of the plaintiff and the conclusion of the California Court. *Hayes* v. *Durham Life Insurance Company* (1957) 198 Va. 670, 96 S. E. 2d 109, 112. We have heretofore had occasion to consider *Hayes* in this connection; and, while we have expressed some reservations on its reasoning, we have recognized that it is binding upon us in a diversity case arising in Virginia such as here. *Justice* v. *Prudential Insurance Company of America* (4th Cir. 1965) 351 F. 2d 462, 463. In that case, we said:

> * * * Subsequent cases may afford Virginia the opportunity to limit Hayes to its facts in view of the growing recognition of the public interest involved in requiring insurance companies to act promptly when they hold an applicant's premium in order not to mislead him to his detriment into believing that he is covered, but such a decision in view of the very broad and sweeping dicta of the Hayes case should come from Virginia's courts. We therefore conclude with the district court that the Hayes case is controlling and fatal to the plaintiff's cause in this action."

Accordingly, the judgment of the District Court is affirmed.

Affirmed

WIDENER, Circuit Judge, dissenting.

I respectfully dissent.

I first note that the opinion, on page 2, indicates that "[t]he insured Ralph N. Wood, Sr. applied for a policy of ordinary life insurance on April 9, 1971," and it appears from the record that the application was made by the appellant, Progressive Enterprises, being signed by Clarence Wood on behalf of the plaintiff as applicant, and by Ralph Norris Wood, Sr., as the proposed insured.

I further note that the opinion, again on page 2, recites that "[t]he agent for the insurance company issued a Conditional Receipt in the amount of $362.77 on April 16, 1971." The opinion then goes on to set out the provisions contained in the receipt. I think it is significant, however, that neither Progressive nor Wood ever received the conditional receipt and were thus not made aware of the fact that the binder expired by the terms of the conditional receipt at the expiration of sixty days from April 16th. These facts are undisputed.

This then brings me to the testimony from which it must necessarily be inferred that not only was the conditional receipt withheld from Progressive, but also the fact that the coverage had lapsed after sixty days was concealed from Wood and Progressive by New England Life's agent, Watson. I specifically refer to Watson's testimony beginning on page a80 of the appendix?

> "Q. All right. And would you have brought that to their attention?
>
> A. I don't know, sir.
>
> In a case like this—maybe I'll reveal more here about myself than I care to, in a way—in a case like this it is a rather delicate thing, you have a lot of premium dollars you're talking about.

> It is difficult for a lot of people to understand the rating. There are a lot of variables here.
>
> If the time is expired, and if you know the applicant —I have already said that Mr. Wood was doing as much as he could do to get his requirements fulfilled —I don't see that there is much point served by telling the individual that he no longer has insurance under the conditional receipt."

Moreover, it appears that Watson also withheld from Progressive the fact that an extension of the conditional coverage could have been routinely obtained, and that Watson himself made timely payment of the premium demanded by his own company well within 60 days after the date of the conditional receipt. No further demand for payment of any premium was made until after the negotiations concerning Wood's health were completed, the reason obviously being that the insurance company was afraid it would lose the business if it disclosed the true facts to Wood and Progressive.

But this is not all. The foregoing irregularities were compounded by the Company's conscious and deliberate violation of another section of the Conditional Receipt not referred to in the opinion of the court. Section G thereof provides in part:

> "G. *Refund and Cancellation of Receipt.* The Company will refund the amount of this Receipt
>
> * * *
>
> (upon certain conditions not mentioned here because the company admits and relies on the fact that the coverage and temporary receipt lapsed on June 16, 1971)

Despite the clear language of the receipt as to refund, and the asserted lapse of coverage on June 16, 1971 (indeed, this is the essence of the entire defense of this claim), the company, in writing, not through inadvertence but by design, has shown its intent to keep the true facts from the insured. This calculated act with its obvious intent to lull Wood into a false sense of security is exposed by an internal memo sent by the home office of the company to its Richmond office. The memo also makes clear that the company was with the agent in the plan, part and parcel, and is here copied:

> "The Conditional Receipt period has expired, and there is no longer any insurance coverage under the Conditional Receipt. *It is not necessary to make any refund at this time, unless the applicant requests it.* We will continue underwriting, although on a non-prepaid basis. If we decline, or if the applicant refuses the offered policy, the prepayment must be returned in full." (Emphasis added.)

Thus, it appears to me that New England Life, after having extended temporary coverage to Progressive on the life of Wood, failed to inform Progressive of the terms of that coverage, failed to notify it when the coverage lapsed, failed to indicate that if Progressive so desired, it could seek an extension of that temporary coverage which would be granted routinely, and in all events accepted the payment from its own agent which it did not refund in violation of the terms of the receipt itself. I would further point out that in Virginia the agent of an insurance company is the insurance company. What he does, it does. What he knows, it knows. So all the acts both of Watson and his insurance company are attributable in law to the company. See *Boykin*

& Taylor v. *Columbia Fire Ins. Co.,* 90 F.Supp. 647, 650 (E.D. Va. 1950); Va. Code § 38.1-292.[1]

Thus, it would seem to me that New England Life, having failed to inform Progressive of the conditional nature of the insurance coverage extended under the conditional receipt, or, indeed, of any other fact it had a right to know, should not be allowed to assert successfully a lapse in that coverage at this time. Certainly, New England Life should have given Progressive a copy of the conditional receipt and informed it of the fact that coverage lapsed sixty days thereafter. Certainly it should have refunded the premium obtained. Failing in this, should it now be permitted to rely upon that lapse in coverage to deny Progressive's claim? I think not.

I, of course, recognize the problems presented by the Virginia Supreme Court's decision in *Hayes* v. *Insurance Co.,* 96 SE2d 109, 198 Va. 670 (1957). There, however, the question was whether any coverage had ever existed. Here, there is no question but that there was a conditional policy in force following the insurance application. The issue is whether New England Life may assert the lapse of that coverage in light of its agent's actions which must be imputed to it, as well as its own actions, and I am convinced that we are not bound by the *Hayes* decision. In this conclusion, I am reinforced by the fact that the Virginia court, in *Hayes,* took pains to point out a pertinent fact, and the

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[1] Whether Watson was a special agent with limited authority, or a general agent, is of no moment here. The company does not deny Watson's authority to issue the conditional receipt, and his failure to deliver it is, therefore, chargeable to the company. Having failed to provide the insured with such a receipt, the company should not be permitted to rely upon limitations contained in the receipt to defeat coverage. Its claim that Watson failed to notify Progressive of the termination of coverage at the expiration of the sixty day period is not material, I think is not even a colorable defense.

one that should require our case to be distinguished: "The defendant company [in *Hayes*], moreover, did not issue or authorize to be issued interim or 'binding' insurance, that is, insurance effective from the date of the application and payment of the premium for a policy." 198 Va. p. 672. Such interim insurance was admittedly issued here. That is very nearly all this case is concerned with.

In Virginia, even oral binders or contracts for temporary insurance are enforced. *Casualty Corp.* v. *Baldwin*, 196 Va. 1020, 86 SE2d 836 (1955). No reason exists not to enforce a written agreement of like tenor when the company has deliberately misled the insured as to its effectiveness and retained the premium paid, and in the face of the finding by the district judge that ". . . the only notice that Progressive . . . had that there was a binder of insurance was oral notice from the special agent to Progressive . . . that the policy of insurance was bound."

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 73-541-R

Progressive Enterprises, Inc.

v.

New England Mutual Life Insurance Company

FINDINGS OF FACT
CONCLUSIONS OF LAW

In this diversity action the defendant, New England Mutual Life Insurance Company, a Massachusetts resident, issued a policy of insurance bearing date of issue 28 May 1971 on the life of Ralph Norris Wood, Sr., in the face amount of $100,000.00, payable upon death of Ralph Norris Wood, Sr., pursuant to the terms of the policy. The policy was owned by the plaintiff, Progressive Enterprises, Inc., a Virginia resident, and Progressive Enterprises, Inc. was the beneficiary of the policy. The policy contained the following clause regarding suicide:

> If the insured, whether sane or insane, shall commit suicide within two years from the date of issue of this policy, the liability of the company under this policy

shall be limited to the payment in one sum of the amount of premiums paid, less any indebtedness to the company.

The application for the policy was made by plaintiff on 9 April 1971. This application was signed for defendant by Hunter Watson on a form which designated him an agent for the defendant, although in fact Hunter Watson was a special agent for the defendant. The policy was signed by Clarence Wood on behalf of the plaintiff as applicant for the insurance, and by Ralph Norris Wood, Sr., the proposed insured. The initial medical examination of Ralph Norris Wood, Sr. also occurred on 9 April 1971.

The next to the last paragraph of the application reads as follows:

> If a conditional receipt amount is paid with this application in accordance with Item 28 above, the insurance policy shall take effect as stipulated in the conditional receipt.

The Item 28 referred to in the application requires that the amount paid for the conditional receipt must be not less than $15, or one month's premium, whichever is larger.

A notation in the blank at Item 28 indicates that a conditional receipt was issued in the amount of $362.27, on the 16th of April, 1971. The conditional receipt which supposedly was drawn at that time is not in evidence, but the printed form for a conditional receipt was introduced and it was stipulated that it contained the same language as the conditional receipt referred to in Item 28 of the application. The conditional receipt contained, in part, the following provisions:

> A. *Underwriting Date.* The "Underwriting Date" shall be the latest of the dates of Parts I and II of the Application and the Report of the Medical Examiner.
>
> C. *If Policy Can be Issued as Applied For.* If the underwriting rules of the Company permit a policy to be issued for the plan of insurance, amount, additional benefits and rate classification applied for, it shall become effective as of the Underwriting Date.
>
> D. *If Policy Can Be Issued, But Not as Applied For.* If the underwriting rules of the Company prevent issuance of a policy exactly as applied for, but permit issuance on some basis, then the policy with the necessary changes (called the issuable policy) shall become effective as of the underwriting date, but only if (1) within sixty days after the underwriting date the applicant accepts any necessary amendment to the Application, and pays any amount necessary to complete payment of at least one month's premium for the issuable policy and (2) at the time of such acceptance and payment the proposed insured is living and there has been no change in his insurability since the Underwriting Date.
>
> F. *Suicide and Contestability.* Any insurance coverage hereunder shall be subject to the suicide clause of the policy applied for and shall be contestable for misrepresentation in the Application within the contestable period of the policy applied for.
>
> H. *General.* No insurance shall become effective except as provided in this receipt. This receipt is not valid unless the Conditional Receipt Amount has been paid in accordance with Item 28 of the application.

The sum of $362.27 which was cited in Item 28 as having been paid on 16 April 1971, was not in fact one month's premium on the policy which was ultimately issued, but

instead represented the sum of money which would have been the monthly premium had the policy been issued as applied for.

There is no evidence as to whether the conditional receipt was actually delivered to Progressive Enterprises, Inc., other than the fact that the conditional receipt was not found in the files of the special agent. Further, there was evidence from the special agent that where, as here, initial premium payment is made by the special agent or by the general agent as an advance for a customer, he ordinarily did not deliver the conditional receipt to the owner of the policy. No interim prepayment certificate was ever issued.

There being no evidence that Progressive Enterprises, Inc. received the conditional receipt, the only notice that Progressive Enterprises, Inc. had that there was a binder of insurance was oral notice from the special agent to Progressive Enterprises, Inc., that the policy of insurance was bound. Progressive Enterprises, Inc., was not apprised that the binder expired by the terms of the conditional receipt at the expiration of sixty days from 16 April.

Ralph Norris Wood, Sr.'s physical condition, under underwriting rules of defendant, did not permit the defendant to issue a policy of insurance to the plaintiff for plan and rate applied for. Instead, the policy ultimately issued to Mr. Wood was a special class, Table H rated, without waiver of premium, and dated on a date subsequent to the date of the conditional receipt.

Progressive Enterprises, Inc. was aware that the defendant was requiring additional medical information and that the cooperation of the insured was necessary in order to obtain the additional medical information. Further, plaintiff knew that the proposed insured was actually involved in the process of furnishing and forwarding additional medical

information, including urine specimens and X-ray pictures, during May, June and July of 1971.

As late as 12 July 1971 the proposed insured participated in permitting a series of X-ray pictures to be taken of his chest, knowing the same to be intended for the purpose of furthering the evaluation by the underwriting department of the defendant so the defendant could determine whether or not to accept the application for insurance.

During the period of time from 9 April 1971 through July 1971, the insured was a co-equal stockholder in Progressive Enterprises, Inc., with his brother Clarence. There is no evidence as to whether or not the insured was an officer of the corporation or a director of the corporation.

The monthly premium on the policy ultimately issued was slightly in excess of $500. The difference between that premium for the issuable policy and the $362.27 premium applicable to the policy applied for was not paid within sixty days from the date of the conditional receipt as required by paragraph D thereof. Nor did plaintiff accept "any necessary amendments to the Application" within the sixty-day period. However, the policy ultimately issued bore an effective date of 28 May 1971, well within the sixty day period. The plaintiff did not reimburse the special agent or the general agent the initial premium advance of $362.27 paid by the special agent or the general agent on 16 April 1971, other than by a check in the amount of approximately $9,600, which was paid by Progressive Enterprises, Inc. to New England Mutual Life Insurance Company on 15 July 1971. This $9,600 represented the combined annual premiums on the Ralph Wood policy and a related policy on the life of Clarence Wood.

Because of the required additional medical information and tests concerning Ralph Wood, defendant was delayed

in approving an issuable policy until 23 July 1971. The policy was delivered to plaintiff shortly thereafter and thus was never in existence during the sixty-day conditional receipt period.

The contract of insurance as issued and accepted by the plaintiff was dated 28 May 1971. This back-dating of the contract was done as a matter of good business practice on the part of the defendant and as an added inducement to Progressive Enterprises, Inc., the purchaser of the policy. The back-dating of the policy had elements of benefit to the plaintiff since it tended to reduce the annual premium. The policy was in full force and effect on 5 May 1973.

Ralph Norris Wood, Sr., in his early 50's, died on 5 May 1973. Mr. Wood died in his bedroom, at his home on 20 Carraway Terrace, Grafton, Virginia. He died of a shotgun blast from his 12-gauge shotgun. At the time of his death, Mr. Wood was having marital difficulties with his second wife, Betty Wood, and the two of them were planning a divorce. Mr. Wood was also having an affair with the wife of his next-door neighbor. He had agreed to pay his wife $10,000 in settlement under their divorce plan.

Mr. Wood had been hospitalized in November of 1972 with severe chest pains which were diagnosed as resulting from a hiatus hernia. His condition was improved at the time of his death but had not been cured. This condition contributed to a nervous, anxious and depressed state on the part of Mr. Wood. Mr. Wood was taking medication for the hernia and for the depressed and anxious state at the time of his death. It had been determined that surgery might become necessary in order to correct the hiatus hernia condition but it had recently appeared less likely that surgery would be necessary.

Mr. Wood was a regular drinker and not infrequently drank to excess. On 21 April 1973, while under the influence of alcohol, Ralph Wood was discovered by his wife upon her return home from an errand brandishing his shotgun, loading and unloading it repeatedly, and in a somewhat incoherent manner threatening to "end it all." After some time she was able to take the weapon away from him and she took it to his mother's home nearby with the request that it be kept from Mr. Wood.

Betty Wood had on several occasions assaulted her husband by striking him with objects such as bottles and ashtrays. The couple often violently argued with each other, especially when they had been drinking.

Mr. Wood had been for many years a one-half stockholder in Progressive Enterprises, Inc., a construction company, with his brother Clarence Wood being the owner of the other half of the common stock of the corporation. Progressive Enterprises, Inc., had lost money for the fiscal year ending 31 March 1973. Ralph Wood felt he was no longer physically able to do construction work in the field as he had been accustomed in the past. He believed he was no longer carrying his load with the corporation.

On 4 May 1973, the day before his death, Ralph Wood sold his interest in Progressive Enterprises to his brother Clarence for an agreed price of $25,000. Under the terms of sale Clarence agreed to pay, and did pay, $10,000 at the time of closing on 4 May with the promise to pay the $15,000 balance at the rate of $1,000 a month for the next fifteen months. Out of the $10,000 paid at the time of closing, Ralph Wood paid approximately $2,300 to Progressive Enterprises, Inc., for the purchase of a company car which he had theretofore used. He also paid off an old loan to another brother in the amount of approximately $1,800.

Mr. Wood owned his home, which was mortgaged. He owned some small real estate holdings other than his home. He owned an automobile which was worth approximately

$2,300, and he owned a boat. He was receiving disability payments, or workmen's compensation payments, at the time of his death. He was financially solvent but was unemployed.

Betty Wood, the widow of the deceased, was suffering from a diabetic condition which had not been stabilized but was being treated by insulin injections. On a day following her husband's death Mrs. Wood was hospitalized, not for the first time, with a hypoglycemic condition. Hypoglycemia sometimes results in conditions of confusion, irrationality, and unconsciousness, from which the patient may spontaneously recover.

On the morning of 5 May 1973, Ralph Wood, Betty Wood and Vicki Wood, Betty Wood's daughter by a previous marriage, drank whiskey together. Along about noon on that day Clarence Wood and his family arrived and stayed at the house for approximately one-half hour. Ralph Wood had originally planned to go fishing with Clarence on that day but declined to go fishing, stating that he did not feel well.

During the period of time that Clarence Wood was visiting in the home of his brother, Ralph Wood was reclining on the sofa in the living room of the home. Clarence Wood did not notice any evidence of depression on his brother's part. At or about the time that Clarence Wood and his family left, Mrs. Wood stated she was tired and she went into her bedroom and lay down. At the time she went into her bedroom Mr. Wood was still lying on the sofa. The time was approximately 1:00 o'clock. Mrs. Wood had had nothing to eat since a light breakfast at approximately 8:30 a.m., and she had consumed at least two drinks of whiskey later that morning.

At approximately 3:10 p.m. that afternoon Ralph Wood's mother telephoned her son's home and after the telephone had rung several times it was answered by Betty Wood. The

mother of Ralph Wood asked to speak to Ralph. She was told by Betty Wood that he was not there. Betty then said, "Wait a minute," and left the telephone. After waiting a short while, Mrs. Wood, the mother, hung up and telephoned again. The telephone at the Ralph Wood residence apparently had been returned to the hook because the telephone rang for some time, but no one answered.

At approximately the same time, that is approximately 3:10 p.m., one of Mr. Ralph Wood's grown sons, Gary Dennis Wood, arrived at the front door of his father's home. He knocked on the door vigorously several times. He was able to see into the living room and into the dining room of the Wood home by looking through panes of glass in the front door. While waiting for someone to come to the door, he peered through the pane of glass. He heard the telephone ring and he saw Betty Wood during the interval when she passed by the doorway leading from the living room into dining room, dressed in a short nightgown. He noted that the telephone ceased to ring at about the time that Betty Wood would have arrived at the position of the wall telephone in the kitchen. He heard Betty Wood say hello. He was unable to discern any further conversation and he did not see Betty Wood again. He knocked on the door some further times and shortly left the premises. No one came to the door.

Betty Wood has no recollection of anything that occurred on the afternoon of 5 May from the time she went to her bedroom to go to sleep, approximately 1:00 p.m., until she awoke not knowing the time. When she awoke her speech was impaired and her ability to move, stand and walk was adversely affected. She speculated that she had had a stroke. She made her way to the front door, opened it, and called ineffectually for help. She then returned to the kitchen, and being mindful of her diabetes, she sought some sweetened

iced tea which was in the refrigerator. She opened the refrigerator and removed the pitcher of iced tea but was unable to hold it. She dropped it onto the floor where the pitcher broke, spilling the iced tea.

Mrs. Wood went to the kitchen telephone and called her daughter, Vicki Wood. She told her daughter that she thought she was suffering from a stroke and she asked Vicki Wood to come immediately. The time of this telephone call was approximately 7:00 p.m. on 5 May.

Vicki Wood arrived at the Wood residence at approximately 7:10 p.m., She found Betty Wood clad in a pajama top and underclothing, sitting on the floor in a corner of the dining room. Vicki Wood, after finding her mother on the floor in an apparently dazed condition, went to Ralph Wood's bedroom, located immediately adjacent to her mother's bedroom, to obtain his help with respect to her mother's problem. The door was closed when she approached it. When she tried to open the door she was met with resistance. With the application of force she was able to open the door approximately two to three inches. Through the opening she saw Ralph Wood's legs at a point between his knee and his ankle. She saw the legs alongside each other with the right leg nearest the door. The door and the right leg were in contact with each other.

Believing that Ralph Wood had passed out from excessive drinking of alcohol, Vicki Wood went back into the dining room and assisted her mother onto the sofa in the living room. Vicki Wood then went back to the bedroom door and pushed open the door with substantial effort in order to open the door sufficient to get in. In so doing she necessarily moved the body of Ralph Wood as she opened the door. She opened the door sufficient for entry sideways and no more. Mrs. Vicki Wood is slightly over five feet in height, and weighs approximately 115 pounds.

When Vicki Wood first entered the room she noted that the head and shoulders of the deceased were slumped down against the wall between the corner of the room and the closet in that room. The torso, hips and legs of the body were stretched out on the floor substantially parallel to the east wall of the bedroom, alongside the door.

When Vicki Wood got into the room she picked up the left hand of Ralph Wood and looked into his face. At this time she realized that he had been shot and she believed he was dead. Vicki Wood left the bedroom and called for the rescue squad for her mother. The rescue squad arrived shortly and one or more of the squadsmen entered the bedroom.

Later Deputy Sheriff Walter Cooper entered the room. He also encountered difficulty in opening the door because of the proximity of the body and was able to enter the room only by moving sideways through the partially opened door.

Shortly thereafter Dr. George S. Mitchell, Jr., the Assistant Medical Examiner from Newport News, also entered the room. He also found it necessary to enter the room by moving sideways because the body of the deceased was up against the door.

Mr. Ralph Wood's shotgun was found on the floor of the bedroom near the foot of the bed partially underneath a dresser, a distance of approximately six feet five inches from the feet of the deceased. There was a discharged shell in the shotgun, another unfired shell in a partially opened drawer, and another unfired shell just outside the door of the bedroom. No fingerprints were found on the shotgun. No pellets from the shotgun were recovered in the room. A portion of the pellets were recovered from the T-shirt in the vicinity of the exit wound, but none of these pellets apparently had penetrated the T-shirt itself.

There were slight bloodstains on the counterpane of the bed. There was substantial blood immediately under the torso of the body and there was blood on the left hand of the deceased. This blood was along the outer edge of the forefinger and the thumb held in contact with each other to form a circle.

Dr. Mitchell set the approximate time of death as between 2:00 p.m. and 3:00 p.m., stating that the death might have been slightly earlier than 2:00 p.m., but that he did not believe the death was later than 3:00 p.m. Dr. Mitchell based his approximation of the time of death primarily on the state of rigor mortis and on the dried blood. Dr. Mitchell determined that Mr. Wood had died as a result of a shotgun wound.

Dr. Mitchell measured the entrance and exit wounds. The entrance wound was measured as being approximately one inch-and-a-quarter in diameter, it was round, and was located in the left anterior chest. It was located on a line sixteen inches down from the top of the head, and four and one-half inches to the left of the mid-sternal line. The exit wound was slightly larger in diameter than the entrance wound. It was measured on a line twenty-one inches down from the top of the head and six inches to the left from the mid-sternal line. Thus the exit wound was lower down on the body than the entrance wound and to the left, as compared to the entrance wound. There were extensive powder burns in the area of the entrance wound. The diameter of the entrance wound approximated the diameter of the muzzle of the shotgun. The exit wound was ragged.

Dr. Mitchell concluded that this was a so-called contact wound, meaning that the gun barrel at the time of discharge had been held in contact with the skin, or extremely close thereto. From the direction and pattern of the powder burns, and the path of the pellets through the body, Dr. Mitchell

and Dr. Mann, former Chief Medical Examiner for the Commonwealth, concluded that the gun had been held at a slight angle to the right and had been elevated above and perpendicular to the body of Mr. Wood at the time it was discharged.

From the blood patterns in the room, the location of Mr. Wood's body, the location of an overturned bedside table and the location of the shotgun, Dr. Mitchell concluded that Mr. Wood was probably near the foot of the bed, on the bed's own righthand side, at the time he was shot. He was unable to fix the location with certainty or whether Wood was standing, bending, sitting, kneeling or lying prone when the shot was fired. Because of the fact that there was substantial blood under the body, and because of the fact that those pellets which emerged from the body were caught in the bloody T-shirt, Dr. Mitchell acknowledged that the body could have been prone on the floor in the spot he found it at the time the shot was fired.

It was physically possible for the deceased to have held the muzzle of the gun near, or in contact with, his left anterior chest, with his left hand and to have reached with his right hand and depressed the trigger of the shotgun, causing the gun to discharge. The distance from the muzzle of the shotgun to the trigger of the shotgun was approximately thirty-three inches. Mr. Wood wore a thirty-three inch sleeve, he was five feet eleven inches tall, and weighed approximately 155 pounds.

A blood sample of the deceased, taken by Dr. Mitchell at approximately 10:00 p.m. on 5 May measured 0.30 milligrams per cent for alcohol.

The law enforcement officers who investigated the death of Mr. Wood reported no evidence of breaking and entering. They reported that the two windows in the bedroom, the

only other means of entry, were locked at the time they arrived on the scene. No gun cleaning equipment of any kind was found in the bedroom where Mr. Wood was shot and there was no evidence that Mr. Wood intended to go hunting on that day or at anytime shortly thereafter. Mr. Wood had had the shotgun in question for approximately six years at the time of his death. He was familiar with the gun, with the manner in which it was loaded and fired. Mr. Wood did not customarily keep a loaded shotgun in his house.

Loading the shotgun required inserting a shell into one of two entranceways into a chamber in the shotgun and then exerting a pumping action on the handgrip. For firing, a safety had to be released and the trigger depressed.

On cross-examination and in a responsive answer, Dr. Mitchell stated his conclusion that Ralph Wood's death was a suicide. This conclusion was also placed on the certificate of death which he filed. Dr. Mitchell did not order an autopsy under the provisions of Va. Code Ann. § 19.1-43 on the ground that he believed an autopsy would not reveal any facts which could change his conclusion of suicide. Dr. Mann, a criminal pathologist of long experience, testified that Ralph Wood presented the classic portrait of a suicide.

No person has been charged with a crime in connection with the death of Ralph Norris Wood, although Mrs. Wood, the widow, has been questioned by the Commonwealth's Attorney of York County.

On 10 July 1973, Clarence Wood, on behalf of Progressive Enterprises, Inc. signed a claimant's statement which had been filled out by defendant's special agent, Hunter Watson. In the claimant's statement the cause of death was specified as "apparent self-inflicted gunshot wound." Clarence Wood testified that the words "apparent self-inflicted gunshot wound" to him meant suicide. Clarence

Wood further stated that in his personal view and belief the deceased had not, in fact, committed suicide but that he had been guided primarily by the statement contained in the certificate of death in signing the claimant's statement.

Plaintiff in due time made demand upon defendant for the face amount of the policy. The defendant refused to honor that demand on the ground that the deceased had died by suicide "within two years from the date of issue" of the policy. On 20 July 1973 the defendant company forwarded a check in the amount of $11,472.70 to plaintiff, being a return of premiums with interest. This check was refused by the plaintiff.

Conclusions Of Law

As a threshhold question, this Court is satisfied that the defendant has met his burden of "clear and satisfactory evidence" in proving that the insured, Ralph Norris Wood, Sr. took his own life. The doctrine is well settled in Virginia that:

> . . . [W]here circumstantial evidence is relied upon to establish suicide as a defense to an action on a life insurance policy, the law presumes that death results from a natural cause and the burden is upon the insurer to establish suicide by clear and satisfactory evidence to the exclusion of any reasonable hypothesis consistent with death from natural or accidental causes. *Life and Casualty Insurance Company of Tennessee* v. *Daniel,* 209 Va. 332, 163 S.E.2d. 577, 580 (1968). See also *Life Insurance Company of Virginia* v. *Brockman,* 173 Va. 86, 93, 3 S.E. 2d. 480, 483 (1939).

In the instant case all the evidence tending to prove and disprove the suicide of the insured is circumstantial in nature; however, when viewed in its entirety, the Court is

more satisfied that the plaintiff carried his burden of presenting the "clear and satisfactory" evidence needed to establish suicide.

Having disposed of the primary factual question as to suicide, the principal issue remaining is whether insurance coverage on the life of the deceased began on 16 April 1971, the date the conditional receipt issued, or on 28 May 1971, the date of issue shown on the policy as ultimately issued. Plaintiff's initial application for insurance coverage was submitted on 9 April 1971. The application contained the following pertinent provisions:

> *Prepayment:* If a conditional receipt amount is paid with this application in accordance with Item 28 above, *the insurance shall take effect as stipulated in the Conditional Receipt.* No Conditional Receipt shall be effective unless signed in facsimile by the Secretary of the Company and countersigned by the agent [Emphasis added].

A conditional receipt was issued on 16 April 1971 acknowledging receipt of an initial premium of $362.17. The terms of the conditional receipt reinforced the above quoted language in the application form. Paragraph H of the conditional receipt, also set out hereinabove, reads as follows:

> H. *General: No insurance shall become effective except as provided in this receipt.* This receipt is not valid unless the conditional receipt amount has been paid in accordance with Item 28 of the application [Emphasis added].

There is no doubt that the conditional receipt amount was paid and it is of no legal significance to the instant dispute

that the amount was paid by the defendant's special agent rather than by the applicant or owner. The conditional receipt amount having paid an insurance contract then and there became effective as provided in the conditional receipt. In other words, as of 16 April 1971 the conditional receipt became and was the insurance contract. The remaining critical and controlling provisions in the conditional receipt are set forth hereinabove.

In determining the weight and importance of the terms of an insurance contract it is universally held that, absent any ambiguity, such terms must be interpreted according to the ordinary, natural and popular sense and meaning of their terms. *American Fidelity & Gas Co.* v. *Pennsylvania Gas Co.*, 97 F. Supp. 965 (1951), *aff'd,* 188 F.2d 364, *cert. denied,* 342 U.S. 860, 72 S.Ct. 88, 96 L.Ed. 2d 647 (1951).

Plaintiff's initial contention is that there exists a legal ambiguity in the conditional receipt requiring integration of the conditional receipt and the policy ultimately issued. Resolving such ambiguity in plaintiff's favor, plaintiff contends, would result in continued. uninterrupted coverage from 16 April 1971, the date the conditional receipt was issued. In such event the suicide would have taken place beyond the two year exclusionary period.

Plaintiff argues that Paragraph F of the conditional receipt is legally ambiguous because it makes the conditional receipt subject to the suicide and contestability clause in the "policy applied for." Since that policy was not in existence when the conditional receipt was issued the cited paragraph of the conditional receipt is ambiguous because it related to a contract that would come into existence at a future date. The Court, for reasons which follow, rejects plaintiff's contention.

Ambiguity is generally understood to mean a duplicity, indistinctness or uncertainty of meaning of an expression used in a written instrument. It occurs when the expression of an instrument is so defective that a court which is obligated to place a meaning upon it, cannot, by placing itself in the situation of the parties, ascertain therefrom the parties' intentions. *United Packinghouse Workers of America, A.F.L.-C.I.O.* v. *Maurer-Never, Inc.*, 272 F.2d 647 (10th Cir. 1959). In the case before this court no such ambiguity is apparent. Upon a close examination of the terms of the application, conditional receipt and the policy, either together or separately, the terms are clear and readily understandable.

Paragraph F simply means that the coverage provided in the conditional receipt shall be subject to the suicide provisions of the policy applied for. Plaintiff had applied for a policy of insurance and the suicide provisions of the policy applied for were readily ascertainable.

The whole question of the alleged ambiguity of Paragraph F is not an issue in this case, however, since Paragraph F applies only to the insurance contract existing by virtue of the conditional receipt. If the insured had committed suicide during the sixty-day effective period of the conditional receipt the question of ambiguity might be relevant. But the suicide took place more than two years after the effective date of the conditional receipt.

The only serious question for the Court to decide is when the two-year period, during which suicide is a defense, began. The two possible dates which would be beneficial to the plaintiff are 9 April 1971, when the application was completed, and 16 April 1971, when the conditional receipt was issued. All other significant events in the issuance of the policy took place less than two years before the suicide.

The insurance policy as ultimately issued, while not the same policy as that applied for, showed its "date of issue"[1] as 28 May 1971. The latter date is within 60 days of 16 April 1971. Accordingly, says plaintiff, Paragraph D of the conditional receipt is applicable and the underwriting date becomes fixed as of 16 April 1971.

Paragraph D, quoted above, would permit 16 April 1971 to be the underwriting date even though the policy ultimately issued was different from the policy applied for provided certain conditions are met. Within sixty days after issuance of the conditional receipt the applicant must have (a) accepted the changes in the policy and (b) must have paid at least one month's premium due on the policy as ultimately issued.

Although the defendant specified 28 May 1971, a date within the 60-day period, as the "date of issue" it is undisputed that the changes which might be necessary were not yet known to plaintiff or defendant as of that date. It was not until 23 July 1971, well after the 60-day period, that the final decision as to the content of the insurance contract were made. The plaintiff accepted these changes a few days thereafter. In the normal course of business the parties, to their mutual benefit, agreed to back-date the policy to 28 May 1971. Accordingly, the defendant received payment

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[1] "Date of issue" is the date from which the insured is compensated for assuming the risk, notwithstanding that it assumed no liability until subsequent premium payment and delivery of the policy occurred. Between the "date of issue" and the delivery of the actual policy an insured pays for coverage he does not receive, nevertheless, the company must, since it selected that date, be bound by that date for all purposes wherein the date of issue is taken into account. And if there is any ambiguity about whether the "date of issue" is the date of issue specified in the policy, or some other date, that ambiguity should be resolved against the insurance company. *State Mutual Life Insurance Co.* v. *Stapp*, 72 F.2d 142 (7th Cir. 1934). *Mutual Life Ins. Co.* v. *Hurni Packing Co.*, 263 U.S. 167, 44 S.Ct. 90, 68 L.Ed. 235 (1923).

for a period of time when no coverage was provided and plaintiff agreed to accept the policy as of 28 May 1971 in order to avoid an age change requiring a higher premium.

Further, it is undisputed that the "one month's premium" required to be paid within the 60-day period was not paid until 15 July 1971. It is true that a premium of $362.27 was paid by 16 April 1971, but this premium was applicable to the policy as applied for. The premium due on the policy ultimately issued was in excess of $500 per month. This higher premium was not paid until the 60-day period contemplated by the conditional receipt.

Plaintiff, nevertheless, claims that despite the fact that the premium on the policy ultimately issued was not paid within the 60-day period, the defendants' act of placing the "date of issue" on the policy as ultimately issued well within the 60-day period contemplated by the conditional receipt would require judgment for the plaintiff. Plaintiff, relying on *American National Ins. Co.* v. *Motta,* 407 F.2d 157 (5th Cir. 1968), argues that the pre-dating of a policy, even at the insured's request, does not absolve the company of whatever liabilities might attach to the earlier date.

In *Motta,* however, the policy ultimately issued was the same as the policy originally applied for and it was issued within the period of time specified by the conditional receipt. The Court in *Motta* found an ambiguity with respect to the effective date of the policy. The relevant terms of the conditional receipt issued on 20 April 1964 provide as follows:

> The insurance for which application is made shall be effective (1) on the date of the receipt or (2) on the date of completion of all medical examinations required by the company rules and practices whichever date is later, if on such effective date all persons to be insured are in good health and acceptable for insurance under established rules and practices of the company, amount and premium applied for. 407 F.2d at 168.

Later on 9 June 1964 the insurance company issued its formal policy bearing an issue date of 9 June 1964 and containing the provision:

> 3. Effective Date: This policy shall be effective on the Policy Issue Date upon payment of the full first premium and delivery of the policy during the lifetime and good health of the Insured. *Motta* at 168.

Reading the terms of the conditional receipt and the policy together, the Court in *Motta* found that there was an ambiguity with respect to the actual effective date of the policy. Confronted with such an ambiguity the Court was bound to decide in favor of the insured.

On the facts presently before this Court there exists no ambiguity with regard to the terms of the conditional receipt and the policy itself. Accordingly, the reasoning in *Motta* is not on point.

Here the policy ultimately issued bore the date of 28 May 1971. Since it was not the same as the policy originally applied for it could have been effective as of 16 April 1971, the underwriting date, only if the two specific provisions of Paragraph "D" of the conditional receipt were met. This Court found hereinabove that the plaintiff failed to pay, within the 60-day period contemplated by the conditional receipt, the one month's premium due on the policy as ultimately issued. Because the conditions of paragraph "D" of the conditional receipt were not met the policy ultimately issued was not effective as of 16 April 1974. Instead, the effective date of said policy must be 28 May 1971, the "date of issue" as clearly stated on the front page of that policy.

Accordingly, and for the reasons stated, the Court holds that the insurance policy in effect on 5 May 1973 was that policy commencing on 28 May 1974; and, therefore, judgment shall be entered for the defendant.

The clerk shall enter an appropriate order.

/s/ D. Dortch Warriner
United States District Judge

Date: 12-31-74

APPENDIX C

THE SUPREME COURT OF APPEALS OF VIRGINIA

Annie C. Hayes

v.

Durham Life Insurance Company, a Corporation.

* * *

Mrs. Annie C. Hayes instituted this action to recover $6,500 from the defendant, the Durham Life Insurance Company. She alleged in her motion for judgment that she was the beneficiary named in a "certain contract of life insurance," between the defendant company and Ozy Earle Hayes, her late husband, and that such contract was in full force and effect at the time of her husband's death. The defendant company filed its answer and grounds of defense, in which it admitted that Ozy Earle Hayes had made an application to it for life insurance; but denied that his application had ever been accepted and that any contract for life insurance was or ever had been in effect between the defendant and plaintiff's husband.

The case came on to be heard, and at the conclusion of plaintiff's evidence, the trial court sustained defendant's motion to strike the evidence. The jury returned a verdict for the defendant and judgment was accordingly entered. Upon plaintiff's petition we granted this writ of error.

The evidence is without material conflict and presents the following facts and circumstances:

On March 17, 1955, Ozy Earle Hayes made application for life insurance with the defendant in the amount of $6,500 through its agent, J. W. Douglas.

The application, signed by the decedent, reads, in part, as follows:

"* * * 2. That no statements, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the Company or in any manner affect its rights, unless such representations, promises or information be reduced to writing and presented to the Officers of the Company at its Home Office. * * * 4. That the Company shall incur no liability on account of this application until a policy be issued and delivered to me during the lifetime and good health of the life insured and the full first premium stipulated in the policy has actually been paid to and accepted by the Company * * *."

Hayes was told by Douglas that there was no need to make payment on the initial premium until he had passed a medical examination. On March 19th, Hayes was examined by a physician, and on March 20th or 21st the physician advised Douglas that Hayes had passed the examination.

On March 22, 1955, after the application was received at the home office of the defendant company at Raleigh, North Carolina, it wrote Hayes thanking him for choosing the Durham Life Insurance Company as the medium for his insurance, advising him that his application would be given prompt consideration. On the same day, it wrote its district manager at Richmond, Virginia, that it would not accept the application for insurance except on a rated basis at a higher premium, and that it would further consider the application if Hayes was willing to pay the increased premium. Not receiving an answer, the home office again wrote its local office on April 1, 1955, requesting a reply to its letter of March 25th. No answer was made to this letter.

On March 25th, Douglas advised Hayes that he had "passed" the physical examination, collected from the applicant $8.90, and gave him a receipt for the premium, using

a receipt form not usually associated with such an application. This receipt stated with respect to the "Policy No." that there was "None," and that the money paid was received "as a deposit to be applied on account of premiums on the above policy, providing it is in force * * *."

On April 13, 1955, Hayes died from a heart attack while at work. His death was reported the next day to the Richmond office of the defendant. On April 15, 1955, the home office of the defendant made an additional inquiry of the local office regarding its letter of March 25th. On April 18th, the local office replied, informing the defendant that the applicant had died on April 13th, and that the premium collected had been returned.

It is undisputed that Douglas was only a special agent in soliciting for life insurance, and that he had no power to approve the acceptance of an application for insurance, make any insurance contract, issue a policy, or to represent that the insurance would be effective from the date of the application therefor. The defendant company, moreover, did not issue or authorize to be issued interim or "binding" insurance, that is, insurance effective from the date of the application and payment of the premium for a policy. Its rules required that all applications be sent to the home office for consideration.

[1] To be effective as a completion of a contract of insurance the acceptance of an application or proposal therefor, like the acceptance of offers generally, must be upon the terms offered. The application for insurance is a mere proposal for a contract on the part of applicant. It is one of two prerequisites in the creation of the contract, the other consisting of the acceptance of the offer. No contractual relationship exists between the parties until acceptance by the insurer, and the application may be withdrawn at any

time by the applicant before it is definitely accepted. 10 M. J., Insurance, § 20, page 307; 29 Am. Jur., Insurance, § 137, page 152; and § 139, pages 153, 154.

In Virginia we have long been in accord with the weight of authority that mere delay on the part of an insurance company in refusing to act upon, or failing to act upon, an application for insurance does not of itself create a contract, nor estop the insurance company from denying that any contract was made. *Haskin* v. *Agricultural Fire Ins. Co.*, 78 Va. 700 (1884); *Haden* v. *Farmers & Mechanics Fire Association,* 80 Va. 683; *Peoples Life Ins. Co.* v. *Parker*, 179 Va. 662, 20 S.E. 2d 485; 10 M. J., Insurance, § 20, page 307; 29 Am. Jur., Insurance, § 141, pages 155, *et seq.;* Annotation, 32 A. L. R. 2d 487, *et seq.;* 1 Cooley's Briefs on Insurance, 2d Ed., page 596; Vance on Insurance, 3rd Ed., § 38; *Ross* v. *N. Y. Life Ins. Co.,* 124 N.C. 395, 32 S. E. 733, 734; *Zayc* v. *John Hancock Mutual Life Ins. Co.,* 338 Pa. 426, 13 A. 2d 34, 36. Cf. *Northern Neck Mutual Fire Association* v. *Turlington*, 136 Va. 44, 116 S. E. 363.

In this case the plain and simple language of the application and the terms of the receipt put the applicant on notice that he was not protected unless and until a policy of insurance was "issued and delivered" to him during his lifetime and while he was in good health.

In *Haskin* v. *Agricultural Fire Ins. Co., supra,* 78 Va. at page 707, we said this:

"The fact that an application has been made for insurance, and a long time has elapsed, and the rejection of the risk has not been signified, does not warrant a presumption of its acceptance. In such cases there must be an actual acceptance, or there is no contract."

In *Haden* v. *Farmers & Mechanics Fire Association, supra,* 80 Va. at page 694, this was said:

"Negligence cannot make a contract of insurance; delay cannot make a contract of insurance."

In 1 Cooley's Briefs on Insurance, 2d Ed., page 596, the author says:

"The rule established by the overwhelming weight of authority seems, however, to be that *mere delay, mere inaction, cannot amount to an acceptance of the application.*"

In an extensive and exhaustive annotation entitled "Rights and remedies arising out of delay in passing upon application for insurance," in 32 A. L. R., 2d, beginning at page 491, many cases are reviewed dealing with contract liability as well as tort liability. The conclusions of the author with reference to contract liability, the subject before us, is summarized on page 493 as follows:

"Based on the doctrines that an application for insurance is a mere offer, which must be accepted before a contract of insurance can come into existence, and that silence and inaction do not amount to an acceptance of an offer, the overwhelming weight of authority is to the effect that, at least in the absence of additional circumstances, no inference or presumption of acceptance which would support an action ex contractu can be drawn from mere delay or inaction by the insurer in passing on the application."

While we have not dealt with the precise question of the effect of delay or inaction by an insurance company in passing on an application for life insurance, we perceive no distinction between a life insurance contract and other contracts of insurance on that particular point. The great majority of the courts, textwriters, and annotators make no distinction. Moreover, cases from Virginia are listed in the group which shows the majority rule, hereinbefore stated. 32 A. L. R. 2d, pages 493, *et seq.*

[2] Plaintiff seeks to recover on the theory that defendant accepted the application of Hayes on a qualified basis, and

that having failed to promptly communicate its counter proposal to the applicant, or return the premium in a reasonable time, it "committed a tortious dominion over the proposal," which gave the applicant the right to treat his application as accepted.

This contention overlooks the following facts,—that this was not a proceeding in tort; that there was no acceptance of the application upon any basis; that there was no fraud alleged or proven; and that Hayes was charged with knowledge that no contract of insurance would arise until after approval of his application. Under the majority rule, the retention of the deposit by defendant until agreement could be reached was immaterial. *Zayc* v. *John Hancock Mutual Life Ins. Co., supra;* 32 A. L. R. 2d 498.

There was no evidence of the waiver of any provisions in the application signed by the defendant. The provision that the company should incur no liability until the policy was issued and delivered to the applicant informed the applicant that no contract existed until the applicaion had been approved, and thereby limited and qualified all subsequent actions. "To raise an estoppel from silence there must have been some duty to speak, and the failure to do so much have operated to mislead." *Hughes* v. *John Hancock Mutual Life Ins. Co.,* 163 Misc. 31, 33, 297 N. Y. S. 116, 120 (N. Y. Mun. 1937).

Plaintiff relies on several cases which hold that an unreasonable delay in acting upon an application, along with the retention of the premium, constitutes an acceptance of the application, upon a theory that such action is inconsistent with a rejection of the risk. She cites *Reck* v. *Prudential Ins. Co. of America,* 116 N. J. L. 444, 184 A. 777; *Harding* v. *Metropolitan Life Ins. Co.,* 188 So. 177 (La. App.); and *American Life Ins. Co. of Alabama* v. *Hutcheson,* 109 F. 2d 424. These cases represent a distinct minority rule adopted

in a very few jurisdictions. They are distinguishable upon the facts, especially as to the language of the particular form of application or the receipts employed.

For the foregoing reasons, we are of opinion that the trial court was clearly right in striking the evidence and entering judgment for the defendant on the verdict of the jury, and its judgment is affirmed.

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